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IN THE

# Supreme Court of the United States

October Term, 1964

No. 280

IRVING A. KANAREK,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

*To the Honorable Chief Justice Earl Warren, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in the above-entiled case on March 6, 1963; a timely Petition for Rehearing, filed April 5, 1963, was denied on April 17, 1964.

### Citation to Opinion Below.

The judgment of the aforementioned United States Court of Claims was entered on March 6, 1963; concurrently with the entry of judgment said Court of Claims filed a written opinion which is the only one in this case. Said opinion is reported at 314 Fed. 2d 802. The certified record which accompanies this Petition for a Writ of Certiorari includes said opinion [R. 146-151]. (See Appendix A, pp. 1-8).

## Jurisdiction.

As stated, *supra*, the Court of Claims judgment was entered, with written opinion, on March 6, 1963, and timely Petition for Rehearing was filed on April 5, 1963; on April 17, 1964, the Petition for Rehearing was denied without written opinion, by said Court of Claims. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

## Questions Presented.

A. Whether the United States Court of Claims has power to invoke the provisions of "The Industrial Personnel Security Review Regulation" (Department of Defense Directive 5220.6) termed Program "B" for the sake of convenience in this Petition for a Writ of Certiorari (set forth in 20 Federal Register 1554), and its antecedent "The Industrial Personnel and Facilities Security Clearance Program," termed Program "A" for the sake of convenience in this Petition for a Writ of Certiorari, to evaluate the measure of monetary recovery of petitioner whose security clearance while employed at North American Aviation, Inc., was withdrawn without authority by the United States, with the consequent pinning on him of a lifetime "BADGE OF INFAMY",* in view of the fact that this Court holds in *Green v. McElroy*, 360 U. S. 474 at page 504, that Program "A" and Program "B" constitute an "elaborate clearance program" which was unauthorized. Included in this question is whether there was, in fact,

*Language used by this Court in *Wieman v. Updegraff*, 344 U. S. 183 at 191 (involving a State Civil Service employee) and *Peters v. Hobby*, 349 U. S. 331 at 347 (involving a professor of medicine employed as a Special Consultant by the Federal Government).

any administrative remedy whatsoever available to petitioner [See *Public Utilities Commission v. United States*, 355 U. S. 534 at 539 and R. 121].

B. Whether 28 U. S. C. 1491 provides a basis or bases for monetary recovery by petitioner due to the unauthorized withdrawal of petitioner's security clearance by the United States. Included in this question is whether the due process clause of the Fifth Amendment constitutes a basis for recovery and/or whether the just compensation clause of said Fifth Amendment constitutes a basis for recovery.

C. What are the criteria which must be used to evaluate the extent of petitioner's monetary recovery for the damage resulting to him from the unauthorized withdrawal of security clearance by the United States?

**Constitutional Provisions, Statute and Regulations Involved (See Appendix B).**

A. The Constitutional provisions involved are the due process and just compensation clauses of the Fifth Amendment.

B. The Statute involved is 28 U. S. C. 1491.

C. The regulations involved are

1. Industrial Personnel and Security Clearance Program [R. 42-60], held unauthorized in *Greene v. McElroy*, 360 U. S. 474.

2. Industrial Personnel Security Review Regulations, Department of Defense Directive No. 5220.6, held unauthorized in *Greene v. McElroy*, 360 U. S. 474. [Ex. 2 attached to "Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" and referred to at R. 68].

(In this Petition for a Writ of Certiorari 1, *supra*, is termed program "A", and 2, *supra*, is termed Program "B"; the purported Monetary Restitution provisions of these two programs are set forth in Appendix B).

**Statement.**

On April 1, 1958, petitioner filed a timely Petition with the United States Court of Claims [R. 1-6]. This Petition has a Court of Claims Docket Number 139-58. The jurisdiction of the Court of Claims was invoked because the security clearance of petitioner was revoked by the purported authority of Program "A", a regulation promulgated by the Secretaries of the Army, Navy and Airforce on May 4, 1953 [R. 42-60].

Prior to and including July 12, 1954, petitioner was employed at Los Angeles, California by North American Aviation, Inc., hereinafter referred to for convenience as North American, as a Research Engineer. Prior to and including July 12, 1954, petitioner was possessed of a security clearance authorizing petitioner to have access to classified security information up to and including material and information classified as Top Secret.

On or about July 12, 1954, petitioner and North American were informed by the Screening Division of the Western Industrial Personnel Security Board, purportedly an agency of the Department of Defense of the United States Government, that the granting of clearance to petitioner of access to classified security information was not clearly consistent with the interests of national security. Petitioner was suspended without pay on or about July 12, 1954 by North American as a result of said action of said Screening Division. Petitioner's salary at the time of said suspension was $710.00 per month.

After a hearing before the Appeal Division of the Western Industrial Personnel Security Board, petitioner and North American were informed on or about September 29, 1954, that granting petitioner access to classified information was not clearly consistent with the interests of national security.

On or about September 6, 1955 the Industrial Personnel Security Review Board determined that the granting to petitioner of clearance for access to classified information was clearly consistent with the interests of national security. This Board was purportedly operating under Department of Defense Directive No. 5220.6 (termed Program "B" herein), [Referred to as Ex. 2 at R. 68], the effective date of which was April 3, 1955. The aforementioned Directive purportedly superseded the Industrial Personnel and Facility Security Program (termed Program "A" herein). Both of these Programs were found to be unauthorized by this Court in *Greene v. McElroy, supra.* Notwithstanding the determination of the Industrial Personnel Security Review Board (on or about September 6, 1955), that the granting to petitioner of clearance for access to classified information was clearly consistent with the interests of national security, petitioner was not regranted access to information classified as Secret until on or about February 7, 1958 while employed at Radioplane Co.

Due to the fact of the withdrawal of security clearance petitioner was completely deprived of employment utilizing his technical skills from July 12, 1954 to April 9, 1956. During the period September 21, 1955 to April 9, 1956 petitioner had no earnings.

During the period April 9, 1956 to January 21, 1956 Petitioner was employed at Lockheed Aircraft Corp., Missile Systems Division, but notwithstanding the action of the Industrial Personnel Security Review Board of on or about September 6, 1955, and the letter of September 15, 1955 sent to the Headquarters Air Materiel Command [R. 127], the United States did not re-grant petitioner Secret clearance while he, petitioner, was employed at Lockheed.

Due to the fact of withdrawal of security clearance on or about July 12, 1954 and the fact that petitioner was not successful in obtaining re-grant of security clearance to the Secret level (at North American petitioner had a Top Secret security clearance) until on or about February 7, 1958, petitioner has been extensively and permanently damaged due to withdrawal of his security clearance. Due to the fact of withdrawal of security clearance on or about July 12, 1954 and the fact that petitioner was not successful in getting the re-grant of security clearance to the Secret level until on or about February 7, 1958, petitioner has lost forever irreplaceable experience-time in the field of rocket propulsion research in which field he had been engaged. The withdrawal of security clearance disloged petitioner from the field of rocket propulsion research and the entire field of rocket propulsion, research and otherwise, with consequent extensive and permanent damage to him.

Petitioner is co-inventor of a patent (No. 2,760,845) entitled "Stabilized Fuming Nitric Acid," a material now extensively used as a propellant (oxidizer) by the United States Government in jet propulsion driven vehicles, such as vehicles driven by certain rocket engines.

This invention also has non-jet propulsion uses. Petitioner is inventor of a patent (No. 2,930,684) entitled "Propellant Combination Including Liquid Fluorine and Liquid Oxide Oxidizer." Since these inventions occurred during the course of research work while petitioner was at North American, petitioner's interests in said patents were assigned to North American. Nevertheless, North American has had a policy of making certain monetary awards to each inventor in connection with each of his inventions provided the inventor is on the payroll at the time of the issuance of the patent. The "Stabilized Fuming Nitric Acid" patent referred to, *supra*, was issued on August 28, 1956; the "Propellant Combination Including Liquid Fluorine and Liquid Oxide Oxidizer" patent referred to, *supra*, was issued on March 29, 1960. Other patent disclosures both classified and unclassified, were made to North American by petitioner. At least two of said disclosures have resulted in the issuance of Secrecy Orders by the United States Patent Office. (Said Secrecy Orders are themselves not classified. They are transmitted by ordinary mail and are not labeled as classified matter. No patent can issue from a disclosure covered by a Secrecy Order, regardless of the patentability of the subject matter, until the Secrecy Order is lifted.)

The fact of withdrawal of security clearance imposed, and still imposes, a "badge of infamy" upon petitioner. By way of illustration, reference is made to a paper which was presented to the American Rocket Society at its fall meeting, September 18-21, 1955, at Los Angeles, California, by North American personnel. This paper, entitled "Generalized Solution of the Theoretical Specific Thrust of a Rocket Motor for the C-H-N-O-F

Atomic System," did not include petitioner as a co-author because of the fact of the withdrawal of his security clearance.

Due to the fact of withdrawal of security clearance on or about July 12, 1954, employment, professional, and other opportunities for petitioner have been permanently and extensively damaged and limited. Petitioner did not obtain re-grant of security clearance to the Secret level until on or about February 7, 1958. Petitioner's employment and professional opportunities in space age industries and organizations, including, but not limited to, the National Aeronautics and Space Administration, the Jet Propulsion Laboratory, Convair, a Division of General Dynamics Corporation, the Ramo-Wooldridge Corporation and its affiliates, and the Douglas Aircraft Company, Inc., have been permanently and extensively damaged. Due to the fact of the withdrawal of security clearance petitioner has lost forever the capacity to reach levels of financial recompense in both scientific and non-scientific activity consistent with his unique and highly specialized training, abilities, and experience, whether said activity requires security clearance or not.

Petitioner alleges that he has been damaged in the sum of at least $163,831.00.

On August 1, 1958, the defendant made a Motion to Dismiss Plaintiff's Petition [R. 1-6] for the alleged reason that it failed to state a claim upon which review can be granted. On November 19, 1958, in response to this Motion to Dismiss, petitioner filed a brief entitled "Plaintiff's Objections to Defendant's Motion to Dismiss." [R. 11-60]. (On December 3, 1958, petitioner filed certain corrections involving clerical errors

[R. 61-62] to "Plaintiff's Objections to Defendant's Motion to Dismiss".) On October 14, 1959, defendant filed "Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" [R. 63-94].

On May 12, 1961, petitioner filed "Plaintiff's Response Brief to Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" [R. 95-122].

On June 5, 1961, defendant filed "Defendant's Supplemental Documents and Citations" [R. 123-128].

On June 5, 1961, petitioner moved to have the Petition deemed amended by the incorporation of certain matter already before the Court and said Motion was allowed on June 19, 1961 [R. 129-131].

On June 30, 1961, after oral argument before the Court by the parties, the Court suspended further proceedings pending petitioner's "pursuit and completion of the administrative remedy available through the Department of the Airforce," which remedy petitioner contended, and now contends, is, in fact, no remedy at all and unauthorized (see Sec. VII, p. 23 *et seq.* of "Plaintiff's Response Brief to Defendant's Reply to Plaintiff's Objections to Defendant's Motion to Dismiss" [R. 118-122], wherein it is pointed out that there was not any administrative remedy to exhaust since, *inter alia*, Program "A" and Program "B," *supra*, were unauthorized.)

On December 7, 1962, defendant filed "Defendant's Supplemental Brief and Exhibits Following Administrative Action" [R. 133-139], where defendant purportedly determined that $4,677.52 was the maximum that petitioner can recover. Petitioner filed "Plaintiff's Response to Defendant's Supplemental Brief and Exhibits

Following Administrative Action" [R. 140-142] on February 4, 1963, and the affidavit of petitioner [R. 143-145] on February 5, 1963, which affidavit reiterates the fact that Secret clearance was not restored until February 7, 1958 [R. 145]. It was *NOT* restored on September 21, 1955, as set forth in the Court of Claims' judgment and opinion [R. 147]. The Top Secret level of clearance was never restored [R. 145].

On April 5, 1963, petitioner filed a timely request for a rehearing by way of "Motion for Rehearing, Motion for Alteration of Judgment, Motion for Amendment of Judgment, and Motion for New Trial" [R. 152-159] which was opposed by "Defendant's Response to Plaintiff's Motion for Rehearing, Motion for Alteration of Judgment, Motion for Assignment *(sic)*, and Motion for New Trial" [R. 160]. Petitioner's request for a rehearing was denied on April 17, 1964 [R. 161-162], more than one year after the timely request was filed.

**Reasons for Granting the Writ.**

The present paucity of judicial authority on the important question of the liability of the United States to the employee of a contractor of the United States, where said employee's security clearance has been withdrawn without authorization, warrants review by this Court of the instant case to determine the extent of the obligation of the United States under the Fifth Amendment and or under 28 U. S. C. 1491 to Petitioner in view of the fact that said petitioner's security clearance was withdrawn without authorization. (About eight years ago there were 3,000,000 employees and 22,000 private contractors involved in employee-contractor se-

curity programs [R. 18]; today there are probably both more employees and private contractors.) Said security clearance was held by petitioner at a time when he was an employee of North American Aviation, Inc., a contractor of the United States. This question has not been decided by this Court. In *Dooley v. The United States*, 182 U.S. 222 at 224, this Court, in referring to an earlier version of what is now 28 U.S.C. 1491, stated that the statute contemplated "distinct classes of cases," and near the bottom of page 228 in Dooley this Court clearly sets forth that even if a particular case appears to be ruled out under one section of the statute, it may still fall within another section.

1. The instant case presents the question of what criteria shall be used in determining the measure of recovery of an employee of a contractor of the United States when said employee has his security clearance withdrawn without authorization by law; petitioner contends that the Fifth Amendment, by way of the due process and just compensation clauses, and 28 U.S.C. 1491, provide several independent bases for the obligation of the United States to pay for damages resulting from the unauthorized withdrawal of security clearance of a contractor employee. This Court has not decided what criteria shall be used as a measure of damages for the unauthorized withdrawal of security clearance, nor has this Court decided what legal basis or bases shall be used to impose upon the United States the obligation to pay for unauthorized withdrawal of security clearance of a contractor employee. It is respectfully suggested that this Court should review the decision of the Court of Claims in view of the fact that notwithstanding this Court's decision in *Greene v. McElroy*, 360

U. S. 474, that the purported security programs used to withdraw security clearance of petitioner were unauauthorized, the Court of Claims, nevertheless, purportedly used the monetary restitution provisions of those security programs in determining the extent of payment to be made to petitioner. Petitioner claims at least $163,381 should be paid to him whereas the Court of Claims has authorized payment of $4,677.52 plus the possibility of a maximum additional amount of only $5,580.48 [R. 151, including footnote, and R. 3, Item 13 in the original Petition before the Court of Claims]. This Court will grant certiorari following a judgment by the Court of Claims granting to a plaintiff the right to recover even though said Courts of Claims has reserved for further proceedings its determination as to the exact amount of damages. *Caltex, Inc. v. United States,* 100 Fed. Supp. 970 at 980, reversed, 344 U. S. 149. Furthermore, this Court has acted where there is some important and clear cut issue of law that is fundamental to the further conduct of the case and that would otherwise quality as a basis for certiorari, despite the interlocutory status which the case may have in the Court below. *United States v. General Motors Corporation,* 323 U. S. 373 at 377; *Land v. Dollar,* 330 U. S. 731 at 734, note 2; *Larson v. Domestic and Foreign Commerce Corporation,* 337 U. S. 682 at 684, note 3. In the instant case there are such fundamental issues: (1) What is or are the legal basis or bases for recovery? (2) Whether the Court of Claims had the power to invoke the monetary restitution provisions of security programs which this Court has found to be unauthorized, *Greene v. McElroy, supra,* and (3) whether there is, in fact, an administrative remedy in

view of the procedure available, or rather lack of it. The Court of Claims has stated in its opinion [R. 146] that the determination and opinion of March 6, 1963, constitutes a determination of the petitioner's entire claim. Despite *Greene v. McElroy, supra*, and the fact that, in fact, there was no administrative remedy available through the Department of the Airforce [R. 118-122], the Court found an administrative remedy to exist [R. 146]. It is noteworthy in this regard that nowhere in the Court of Claims decision and judgment [R. 146-151] is there any discussion or analysis of the principles of *Greene v. McElroy, supra*, nor for that matter any mention of the case whatsoever.

2. In the decision it is stated [R. 147] that petitioner's security clearance was restored on September 21, 1955. This is not the fact. During the first part of September, 1955, the Industrial Personnel Security Review Board determined that the granting of clearance to petitioner "for access to classified information is clearly consistent with the interests of national security" [R. 126]. Although the Commander, Headquarters Air Materiel Command, Wright Patterson AFB, Ohio, was allegedly instructed to issue clearance for access to classified information to petitioner by way of letter dated September 15, 1955, clearance did not result therefrom; but, rather, it was not until on or about February 7, 1958, that petitioner was able to obtain a re-grant of security clearance to the Secret level [R. 2, Item 9].

3. The Court below laid great stress in its decision on *Dupree v. United States*, 141 Fed. Supp. 773, 136 Court of Claims 57 [R. 148-149]. In *Dupree*, however, the regulations under which Dupree was denied

security clearance were promulgated with express statutory and executive authority, 136 Court of Claims 57 at 58. This Court, as set forth, *supra*, by way of *Greene v. McElroy*, found the security programs which were applied to petitioner to be without authorization. This Court should grant certiorari in the instant case in view of the fact that without such grant there is no appellate review possible of the Court of Claims decision in the instant case, and the law, and novel premise, would be settled, without judicial review, that unauthorized regulations can purportedly be used to determine the criteria for recovery [Bottom of R. 149 to top of R. 150, and note 2 at the bottom of R. 68; also, see Appendix A, p. 6]; such procedure offends due process under the Fifth Amendment as did the unauthorized withdrawal of security clearance; notwithstanding the statements in *Dupree* [R. 148 and Appendix A, pp. 3-4], petitioner contends that the right to follow a lawful calling is Constitutionally protected and hence his claim is one founded upon the Constitution. This is borne out by *Parker v. Lester*, 227 F. 2d 708 at 717 where the Court states, referring to privately employed merchant seamen, that the liberty to follow their chosen employment

> "is no doubt a right more clearly entitled to Constutional protection than the right of a Government employee to obtain or retain his job."

Thus, there is a fundamental conflict between the Court of Appeals for the Ninth Circuit and the Court of Claims; furthermore, it is urged that the position of the Court of Claims is inconsistent with that of this Court in *Wieman v. Updegraff*, 344 U. S. 183, and *Peters v. Hobby*, 349 U. S. 331 (see footnote at bottom

of p. 2, *supra*), in that, as stated by Mr. Justice Douglas in his concurring opinion in *Peters v. Hobby*, *supra*, at 351.

> "We deal here with the reputation of men and their right to work—things more precious than property itself."

The Court of Claims in its decision in the instant case, quoting from its own decision in *Dupree*, *supra* (Appendix A, p. 4) asks the question.

> "did plaintiff lose his means of livelihood because of the alleged violation of his constitutional rights?"

In the case of petitioner the answer must be "yes" since, except for the violation of due process by way of the unauthorized withdrawal of the security clearance vested in him, petitioner would not have been severed from North American and dislodged from the rocket-propulsion field.

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING A. KANAREK,
*Counsel for Petitioner.*

## APPENDIX "A".

### Opinion of the United States Court of Claims.

In the United States Court of Claims.

No. 139-58

(Decided March 6, 1963)

Irving A. Kanarek v. The United States.

*Rex M. Minter* for plaintiff.

*Lawrence S. Smith*, with whom was *Acting Assistant Attorney General Joseph D. Guilfoyle*, for defendant.

Before Jones, *Chief Judge;* Whitaker, *Judge;* Laramore, *Judge;* Durfee, *Judge;* and Davis, *Judge.*

On Defendant's Motion to Dismiss Plaintiff's Petition

Laramore, *Judge*, delivered the opinion of the court:

This case originally came before the court on defendant's motion to dismiss. The court, at that time, suspended the proceedings until plaintiff had exhausted his administrative remedy through the Department of the Air Force.

Plaintiff thereafter pursued said remedy, and the Secretary of the Air Force approved the claim in the amount of $4,677.52.

On July 23, 1962, plaintiff moved that the suspension of proceedings be lifted and that the court set the matter down for argument. This motion was premised on the contention that more money is due plaintiff, and the administrative recommendation of $4,677.52 was unacceptable to him. By order of court, this motion was allowed and, after filing of certain addi-

tional exihibits by defendant,[1] the case was assigned for argument on the validity of plaintiff's claim.

Thus the case now before us calls for a determination of the entire claim of plaintiff as alleged in his petition.

It is plaintiff's claim that in addition to loss of wages during the period his security clearance was withdrawn, he is entitled to a much greater sum representing damages suffered because of lost merit raises and general increases, damages based on a linear increase in earning power, loss of experience in the field of rocket propulsion research, loss of a bonus resulting from an invention of plaintiff, damages because of certain patent disclosures by North American Aviation, Inc., and for damages occasioned by loss of employment opportunities.

Plaintiff alleges his action arises under Article II of the Constitution of the United States, the Fifth Amendment thereto, and section 1491, Title 28 U.S.C., the general jurisdictional act relating to the Court of Claims.

The facts are these: On July 12, 1954, while employed as a research engineer for North American Aviation, Inc., plaintiff's Government clearance for access to classified security information was withdrawn. On September 21, 1955 it was restored.

North American Aviation, Inc., was a Government contractor and had, on April 6, 1953, entered into a written security agreement with the Government, containing various provisions for the safeguarding of

[1]Inasmuch as the defendant filed exhibits to support its motion to dismiss, we now treat the Government's motion as a motion for summary judgment. Rule 16(b) of the Rules of this court.

classified security data that would come into its possession in the course of its performance of Government contracts. One of these provisions was that the Government agreed, upon application of the contractor, to designate employees of the contractor who could have access to certain types of classified security information.

With the exception of plaintiff's claim for loss of wages, we are of the opinion that plaintiff's claims are unfounded, and we will dispose of such claims at the outset.

Plaintiff first contends that his claim has an independent contractual basis in that he is a third party beneficiary of the security agreement the Government had with North American Aviation, Inc. In this respect, plaintiff cites no legal authority, and we know of none favoring plaintiff. On its face, the agreement between the Government and the contractor was designed to protect the interests of the United States and not an employee of the contractor as plaintiff argues. Furthermore, it is apparent that there was no privity between plaintiff and the Government, and since his alleged injuries were the result of dealings between the United States and the contractor, there is no basis for a contract implied or in fact between plaintiff and the United States.

Nor can plaintiff base a claim upon the due process clause of the Constitution. It was so held by this court in *Dupree v. United States*, 136 Ct. Cl. 57. In this case the court stated, at page 61:

> We are, nevertheless, of opinion that his petition is insufficient to state a case as one founded on the Constitution. If it is possible at all in a

case such as this to state a case founded on the Constitution, it would, at least, be necessary to allege facts to show that, except for this violation of his constitutional rights, the certificate would have been granted him, and he would have been permitted to follow his vocation and would have earned the wages for which he sues.

It is hardly conceivable that such a case could be stated, and, even if it could be done, we seriously doubt the right of a citizen to recover a money judgment in such a case. But, assuming such a case could be stated; the question is, did plaintiff lose his means of livelihood because of the alleged violation of his constitutional rights? Otherwise stated, is it necessarily true that the certificate would have been issued to him if his alleged constitutional rights had been respected, that is, had he been confronted by his accusers.

How can we know? Suppose he had been confronted by his accusers and they had testified to the things alleged * * *; and that after these witnesses had been subjected to cross-examination, the Commandant had still believed their testimony, under these circumstances must he have granted the certificate? If this does not follow, plaintiff has not stated a case. Plainly it does not follow.

The *Dupree* case and this case are strikingly similar. Dupree's security clearance was withheld; plaintiff's security clearance was withheld. Here, as in the *Dupree* case, nothing is present, alleged or proved, to convince us that under any circumstances plaintiff's certificate would not have been removed or would have been

granted him so that he would have been permitted to follow his vocation. Having failed to allege and prove the necessary allegations under the criteria of the *Dupree* case, *supra*, plaintiff cannot recover under the due process clause of the Constitution.

Nor has plaintiff stated a case under the just compensation clause of the Fifth Amendment of the Constitution. The action taken was simply the issuance of a regulation designed to protect the United States and action taken thereunder to withhold the security clearance. Its purpose was not to take property for public use, nor was property taken for public use which is essential to a Fifth Amendment taking.

Since there can be no recovery in this case under any article or amendment of the Constitution of the United States, and absent a contract between plaintiff and the United States, plaintiff's only alternative for recovery, with the exception noted earlier relating to loss of wages, would be under a statute, or a regulation, or for liquidated or unliquidated damages for cases not sounding in tort. 28 U.S.C. § 1491.

No statute or regulation is called to our attention and we know of none which could form the basis of plaintiff's claim. Consequently, plaintiff must also fail on this aspect of the case.

Respecting the portion of the statute which permits suits for liquidated or unliquidated damages for cases not sounding in tort, two decisions of the Court of Appeals for the Third Circuit[2] are significant. The facts of the above cases are very similar to the facts

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[2] *Dupree v. United States*, 247 F. 2d 819; *Dupree v. United States*, 264 F. 2d 140.

in this case, and the court therein clearly recognized and treated the alleged actionable conduct of the defendant as a tort. Recovery was denied because the Federal Tort Claims Act specifically precludes recovery for this particular category of torts. We can see no distinction between the two above cited cases and the case at bar. If it was a tort in the case of Dupree, it is a tort in the instant case, and since the statute specifically exludes tort claims from our jurisdiction, plaintiff cannot recover under this court's general jurisdictional act, *supra*.

This brings us to plaintiff's claim for wages lost by reason of the withholding of his security clearance. Paragraph 26, Industrial Personnel Security Review Regulation, Department of Defense Directive 5220.6, dated February 2, 1955, as amended, authorized the secretary of the department concerned to settle reimbursement claims in appropriate cases resulting from the suspension of a contractor employee's clearance.

As noted earlier, plaintiff's security clearance was restored September 21, 1955. Pursuant to this court's order, plaintiff pursued his administrative remedy and the Secretary of the Air Force approved the claim in the amount of $4,677.52, covering the period July 12, 1954 to January 29, 1955, less outside earnings. He did not grant the claim for the balance of the period January 30, 1955 to September 21, 1955, because plaintiff failed to furnish satisfactory evidence to reasonably demonstrate a deligent interest in securing

employment and availability therefor. It was pointed out to plaintiff in the letter allowing his claim in part that he drew unemployment compensation benefits from the State of California up to January 29, 1955, but they were terminated on that date, presumably because he failed to qualify for them under the unemployment code of that state, and that he did not contest or otherwise dispute such action. This was the only evidence concerning plaintiff's efforts to obtain employment during this period.

At the time of oral argument plaintiff was granted the opportunity to file an affidavit concerning his efforts to obtain employment and he thereafter did file such an affidavit. In his affidavit he avers that while he is now unable to state with precision the particular times, he did make efforts to secure employment and he lists the names of certain organizations to which he applied. He also avers that his efforts were to no avail. He also avers that menial employment, such as dishwashing as suggested by the Department of Employment of the State of California, was not sought, and that he was always ready, willing and able to work after July 12, 1954.

We are of the opinion that a person with the scientific background of plaintiff should not be forced to take jobs so far below his level of intelligence and level of his former employment in order to avoid the implication of failure to seek employment. We are further of the opinion that in consequence of his affidavit, a

question of fact now exists which cannot be disposed of except by a trial before a commissioner of this court.

Consequently, we now remand the case to a commissioner for a determination of the unresolved question of whether or not plaintiff actually did attempt to obtain employment in the period January 30, 1955 to September 21, 1955.[3]

On all other phases of the case, defendant's motion for summary judgment is granted, and plaintiff's petition with respect thereto is dismissed.

[3]If plaintiff prevails, he, of course, would be entitled to recover loss of wages for this period in addition to the administrative determination of $4,677.52.

## APPENDIX "B".

### Constitutional Provisions, Statute and Provisions of Regulations Involved.

*Due Process Clause of Fifth Amendment*

nor shall any person

"be deprived of life, liberty, or property, without due process of law;"

*Just Compensation Clause of Fifth Amendment*

"nor shall private property be taken for public use, without just compensation".

*Portion of 82 U.S.C.§491 pertinent in the instant case*

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

*Purported Monetary Restitution Provisions of Regulations Held Unauthorized in Greene v. McElroy, 360 U.S. 474:*

"Industrial Personnel and Security Clearance Program" (referred to as Program "A" in this Petition for Writ of Certiorari.)

"23. *Monetary Restitution:* In cases where a final determination is favorable to a contractor-employee (but not a contractor), the Appeal Division will instruct the Executive Secretary to recommend to the Department whose agency origi-

nally referred the case that the contractor-employee be reimbursed for any loss of earnings resulting directly from the denial or revocation of clearance during the interim in an amount not to exceed the difference between the amount he would have earned at the rate he was receiving upon the date of the initial denial or revocation of clearance and the amount of his interim net earnings."

"Industrial Personnel Security Review Regulation (Department of Defense Directive No. 5220.6) referred to as Program "B" in this Petition for Writ of Certiorari.)

"26. *Monetary Restitution:* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation."